**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 23366 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE JAYANT PATEL**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**I.A.PATEL - Petitioner(s)**
**Versus**
**BHARAT SANCHAR NIGAM LIMITED & 4 - Respondent(s)**

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**Appearance :**
MR ANAND L SHARMA for Petitioner(s) : 1,
MR BN DOCTOR for Respondent(s) : 1 - 4.
NOTICE SERVED BY DS for Respondent(s) : 5,

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**CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL**

**Date : 29/11/2007**

**ORAL JUDGMENT**

1. Rule. Mr. Doctor waives service of notice of rule for respondents. With the consent of the

learned Counsel appearing for both the sides the matter is finally heard today.

2. The Short facts of the case appear to be that the petitioner who was working as Telecom Office Assistant, opted for transfer at Bharuch due to his personal family circumstances, and as per the request of the petitioner on 13.02.1995, he was transferred from Surat to Bharuch. As per the petitioner on 22.11.1995, because of reconstitution of the cadre, his name was included in the select list, but on the basis of the seniority in the year 1996, his name was also included in the list of selected candidates for the post of Telecom Office Assistance on the basis of seniority-cum-fitness. Thereafter, there was change in the policy and ultimately vide order dated 28.9.1999, the petitioner came to be promoted on the basis of seniority-cum-fitness with effect from 1.1.2000. Thereafter, the petitioner was absorbed in BSNL respondent No. 1 herein. However, since he was getting salary less than the juniors were getting, he made representation in the year 2002, but as

nothing was done, the reminder was sent by the petitioner. As per the petitioner, when he pursued the representation, he was served with the show-cause notice, as to why the promotion should not be withdrawn/cancelled. The petitioner again made representation. Ultimately vide order dated 23.08.2006, promotion given to the petitioner pursuant to the order dated 28.09.1999, came to be cancelled, and it is under these circumstances the present petition before this Court.

3. Upon hearing Mr. Anand Sharma learned Counsel for the petitioner and Mr. Doctor for the respondent authority, it appears that 10 percent promotion was required to be given on the inter se seniority of the availability of the post subject to fitness. The relevant rule in the present case is rule 38(1)(2)(3) which reads as under.

**Rule 38**

(1)Transfers of officials when desired for their own convenience should not be discouraged if they can be made without injury to the right of others. However, as a

general rule, an official should not be transferred from one unit to another either within the same Circle, or to another Circle unless he is permanent. As it is not possible to accommodate an official borne on one gradation list without injury to the other members in that gradation list, such transfers should not ordinarily be allowed except by way of mutual exchange. Transfers by way of mutual exchange, if in themselves inherent unobjectionable, should be allowed, but in order to safeguard the rights of men borne in the gradation list of both the offices, the official brought in should take the place in the new gradation list that would have been assigned to him had he been originally recruited in that unit or the place vacated by the official with whom he exchanges appointment, which ever is the lower.

Note:-Transfer of officials who are not permanent in the grade, may in deserving cases, be permitted with the personal approval of th Head of the Circle.

(2)When an official is transferred at his own request, but without arranging for mutual exchange, he will rank junior in the gradation list of the new unit to all officials of that unit on the date on which the transfer order is issued, including also all persons who have been approved for

appointment to that grade as on that date.

(3)If the old and the new unit form parts of a wider unit for the purpose of promotion to a higher cadre, the transferee (whether by mutual exchange or otherwise) will retain his original seniority in the gradation list of the wider unit."

The aforesaid rule 38(2) provides that when the official is transferred at his own request, he will rank junior in the gradation of all officials of that unit on the date on which the transfer order is issued, including all persons who have been approved for appointment to that grade as on that date. Therefore, in view of the same the seniority of the petitioner in the unit of Surat will be lost, and he will be placed as junior most in the seniority list of Bharuch at the relevant date. It appears from the affidavit filed on behalf of the respondents that inspite of the above position of rule, the name of the petitioner by omission was wrongly included in the seniority list, and consequently the benefits and promotion were wrongly conferred upon the petitioner.

4. Therefore, two aspects may be required to be considered on account of the impugned order, one is for correction of the mistake and withdrawal of the promotion, and second is for recovery of the amount of difference.

5. If the department has corrected its mistake, and petitioner was not eligible to get promotion, the respondent may be in a position to cancel the promotion order. However, the ground for which the order is cancelled, may carry relevance. If the cancellation is on account of any fraud played by the employee concerned, or any wrongful conduct on the part of the employee concerned, the matter may stand on different footing, but if the department or the concerned officer of the respondent had committed error or mistake in conferring benefits of promotion, and thereafter, when the error has come to the knowledge of the department or concerned officer, the respondent would not be entitled to recover the amount of difference when the employee concerned is not in fault.

6. The reference may be made to the judgement of

this Court dated 23.11.2005 delivered in Special Civil Application No. 6696 of 2005 and allied matter in the case of **S.M. Rami and others vs State of Gujarat and ors,** in the said decision paras 6,7,8 and 9 it was observed as under:

“6. So far as the fixation of the pay-scale and the rectification of the mistake in fixation of the pay-scale and/or modification of the pay-scale after the payment is already made as per the earlier pay-scale, the matter can be segregated into two parts; one aspect would for the recovery of the amount of difference from the employee concerned due to wrong fixation of pay-scale and the another aspect would be for giving prospective effect to the refixation of the pay-scale. So far as the first aspect is concerned, the position of law is settled in as much as once the payment is already made on the basis of the pay-scale fixed by the competent authority, merely because the another authority subsequently found that the pay-scale was wrongly fixed or there was a mistake or modification is required in the said decision, would not be justifiable ground for effecting recovery of the difference from the employee concerned. The reference may be made to the decision of this Court dated 28.11.2003 in Special Civil Application No.6006 to 6008 of 2002, wherein after following the decision of

Division Bench decision of this Court as well as the decision of the Apex Court, it was observed by this Court at paragraphs 7 and 8 as under:

*7. In view of the above, what is required to be noted is that there is no dispute on the point that pursuant to the decision of the higher authority the payscale in the higher grade was granted to the petitioner and after a period of about more than 4 years the decision is taken of cancelling the earlier decision and as a consequence thereof recovery is sought to be effected. It is not the case of the respondents that the higher payscale came to be granted on account of fraud or misrepresentation or any misdeed which can be attributed to the concerned employee. Therefore, it appears that it is on account of subsequent change of decision by the authority without attributing anything to the concerned employee the decision is cancelled and the recovery is sought to be effected. Therefore, under the circumstances, it will have to be examined as to whether such an act on the part of respondents is permitted under law or not.*

*8. In case of I.C.Patel (supra) the division bench of this court observed as under:*

*"The mistake was committed by the Board for which the appellant should not be penalised. Recovery of excess payment made to the appellant for no fault on his part appears to be wholly unjustified."*

*In case of P.H.Reddy (supra) the Apex Court also found that the order of fixation passed by the appropriate authority does not require any interference. Still however, the Apex Court observed as under:*

*"The employees-appellant, who had been in receipt of a higher amount on account of*

*erroneous fixation by the authority should not be asked to repay the excess pay drawn, and therefore, that part of the order of the authority is set aside.*"

7. Mr.Supehia, learned Counsel during the course of the hearing has drawn the attention of this Court to the order of the Division Bench of this Court (Coram: B.J.Shethna and Sharad D. Dave, J.J.) in LPA No.750 of 2003 dated 16.12.2004, whereby the order of the Single Bench is confirmed and he further submitted that the Special Leave to Appeal (Civil) Nos.6775-6777 of 2005 were also preferred before the Hon'bl Supreme Court, which came to be dismissed as per the decision dated 25.7.2005 of the Hon'ble Supreme Court.

8.In view of the above settled legal position, as the mistake of fixation of the pay-scale cannot be attributed to the petitioners, the recovery of the excess amount paid to the petitioners for no fault on their part is not only unjustifiable but cannot be sustained in the eye of law. The aforesaid would be the consequential position even in respect of the present case and the reason being that the pay-scale of the petitioners were fixed by the District Health Officer and except mistake nothing is attributed to any of the petitioners and, therefore, the recovery of the salary and other consequential benefits already paid to the

petitioners prior to the order dated 27.5.2004 (Annexure “F”) cannot be effected and the impugned order to that extent, in any case, cannot be maintained as against the settled legal position.

9.If the second aspect is considered for the purpose of examining the legality and validity of the action for refixation of pay-scale from Rs.5000-150-8000 to Rs.4,500-125-7000, it appears that it is an admitted position that no opportunity of hearing has been given to any of the petitioners by the District Health Officer before passing the impugned order dated 27.5.2004. Mr.Supehia, learned Counsel for the petitioners, additionally submitted that as such when the earlier pay-scale was fixed, it was duly audited and the auditor had approved the same and thereafter merely because subsequently in the audit the objection raised, is no valid ground for withdrawing the benefits already conferred of the higher pay-scale.”

7. Therefore, when the respondents have cancelled the promotion on account of the correction of the mistake or error or omission on their part, the impugned order for cancellation of the promotion cannot be said as arbitrary or unreasonable, but such cancellation will take

prospective effect and to say in other word that on account of the cancellation of the promotion, the respondent authority would not be entitled to recover the amount of difference of salary paid to the petitioner during the period when the promotion order was in force.

8. Hence, subject to the aforesaid observations and directions the petition is dismissed. Rule discharged. No order as to cost.

***(JAYANT PATEL, J.)***

Suresh*